

APR 5 1984

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IN THE

Supreme Court of the United States

October Term, 1983

BEN SCHWARTZ,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

On Petition for Writ of Certiorari
to the New York Supreme Court,
Appellate Division, First Department

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

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Preliminary Statement

On May 4, 1979 petitioner Ben Schwartz was convicted in the New York Supreme Court, New York County (Sklar, J.), upon his plea of guilty, of Criminal Possession of Stolen Property in the Second Degree (New York Penal Law §165.45). Schwartz was sentenced as a second felony offender to an indeterminate term of from one and one-half

to three years imprisonment. He was released on bail pending appeal and remains at liberty pursuant to a stay of the judgment of conviction against him. By an order dated March 6, 1980 the Appellate Division, First Department, of the New York Supreme Court unanimously affirmed the judgment against petitioner without opinion. 74 A.D.2d 753 (1st Dept. 1980). Petitioner then appealed to the New York Court of Appeals which remitted the matter to Supreme Court, New York County for a hearing on petitioner's motion to controvert a search warrant issued in the case. 52 N.Y.2d 1063 (1981). On December 21, 1981 a hearing was conducted before Justice Hortense Gabel and the warrant was upheld. By an order dated October 18, 1983 the Appellate Division, First Department, again unanimously affirmed the judgment without opinion. 97 A.D.2d 379 (1st Dept. 1983). On December 13, 1983 leave to appeal the Appellate Division's order to the New York Court of Appeals was denied (AP: 7A).*

The Proceedings in the Court Below

A. The Search Warrant

On December 7, 1977 petitioner was arrested for receiving stolen property in a loft on 39th Street in the borough of Manhattan in New York City. Shortly thereafter the arresting police officer, Dominick Ragusa, submitted an affidavit in support of an application for a warrant to search the loft.

* Citations will be abbreviated in the following manner: the Appendix to the Petition for Certiorari will be referred to as AP; the bound Record on Appeal submitted with petitioner's appeal to the New York Court of Appeals will be referred to as R; the minutes of the hearing on remand will be referred to as M.

Officer Ragusa's affidavit stated that at approximately 4:30 p.m. on December 7 he personally observed Anthony Zephier remove a carton from a handtruck and run away (AP: 8A). Ragusa followed Zephier to 270 West 39th Street, fifth floor, Room No. 1, and saw Zephier enter the premises with the carton (AP: 8A). Ragusa waited near the elevator on the fifth floor and saw Zephier leave Room No. 1 without the carton (AP: 9A). Officer Ragusa stopped Zephier, identified himself as a police officer, and placed Zephier under arrest for larceny and criminal possession of stolen property (AP: 9A). The officer advised Zephier of his rights and asked him what he had done with the carton. Zephier replied that he had sold it to "Benny" (AP: 9A). Ragusa entered Room No. 1 and saw the carton that Zephier had stolen, now empty, on a counter, next to a person later identified as the petitioner Benjamin Schwartz (AP: 9A).

Officer Ragusa asked Schwartz, "Where is Benny?" and Schwartz replied that he did not know who Benny was. Officer Ragusa identified himself as a police officer and asked Schwartz what his name was. Appellant replied that he was "Benny" (AP: 9A). Ragusa then arrested Schwartz and advised him of his rights (AP: 9A).

Officer Ragusa entered the area behind the counter in order to determine whether any other people were present. He observed a large number of items including stereos, coats, watches, dresses, handbags, sunglasses, belts, sweaters, various men's and women's apparel, cigarette lighters, and dishes (AP: 9A-10A). Ragusa asked petitioner whether he had any receipts, bills of lading, invoices, or other proof

of ownership for this merchandise; petitioner replied that he did not (AP: 10A).

A man later identified as Purcell Hopkins then walked into the room carrying a carton with the shipping label partially detached. When Hopkins saw Officer Ragusa he attempted to flee. Upon apprehension by the officer, Hopkins said that he had found the carton on the street (AP: 10A). About five minutes after Regusa apprehended Hopkins, another individual known to Ragusa and his unit within the police department as a "rack and package thief" entered Room No. 1 (AP: 10A).

Based upon all of this information, Officer Ragusa asserted probable cause to believe that the property in the loft was stolen and that a fencing operation was being conducted by Benjamin Schwartz at 270 West 39th Street, on the fifth floor, Room No. 1 (AP: 10A).

A search warrant was issued based on Officer Ragusa's sworn affidavit. The warrant authorized an immediate search and seizure of property in the premises occupied by Benjamin Schwartz at 270 West 39th Street, fifth floor, Room No. 1. The property to be seized was described as:

packages, cartons, stored in the premises, also stereos, coats, watches, dresses, ladies handbags, sunglasses, belts, sweaters, various ladies and men's apparel with tags, cigarette lighters and dishes.

(AP: 12A). The warrant was executed. The property seized included: 236 pairs of sunglasses; 21 women's colored dresses; 11 women's colored blouse suits; 4 women's jackets; 10 women's pants suits; 8 pocketbooks; 765 Mickey Mouse watches; and a quantity of women's slacks (R: 24A-25A).

B. Pre-Trial Proceedings

Defendant was charged with three counts of Criminal Possession of Stolen Property in the First Degree (New York Penal Law §165.50), one count of Criminal Possession of Stolen Property in the Second Degree (New York Penal Law §165.45), and one count of Criminal Possession of Stolen Property in the Third Degree (New York Penal Law §165.40). New York County Indictment 5399/77.

Petitioner moved to controvert the search warrant. Justice Irving Lang denied the motion without a hearing when petitioner's counsel conceded that the officer had not lied in his affidavit. Petitioner retained new counsel who renewed the motion, alleging that certain statements made by Officer Ragusa in his affidavit were not true. Petitioner's affidavit in support of his motion averred that at no time did he buy or receive any stolen merchandise from anyone and that no one had removed any of the merchandise in the premises from a handtruck (R: 31A-32A). Petitioner further alleged that police officers entered his loft and searched it without a warrant; he contended that the warrant later obtained was a subterfuge because the property had actually been seized during the first, warrantless search (R: 31A-2A). Justice Lang again declined to hold a hearing, finding no essential contradiction between petitioner's affidavit and that of Officer Ragusa (R: 42A-47A).

C. The Trial and Plea of Guilty

Petitioner proceeded to trial on March 8, 1979 before Justice Stanley L. Sklar and a jury. The People presented two witnesses upon their direct case: **Leo Marzolla** and **Officer Dominick Ragusa**.

Marzolla testified that during December of 1977 he sublet Room No. 1 on the fifth floor of 270 West 39th Street to petitioner (R: 53A-56A). Officer Ragusa testified to the events of December 7, 1977, previously described in his affidavit in support of the search warrant application.

Officer Ragusa's testimony was substantially the same as the statements in his affidavit, with one difference. Ragusa again related how he followed Zephier, the carton thief, to the fifth floor at 270 West 39th Street (R: 5-6, 8, 25-7). He then frankly noted that he waited by the elevator when Zephier exited that elevator, and lost sight of Zephier as Zephier turned a corner down the corridor (R: 10, 28-9, 93). When Zephier returned to the elevator without the stolen cartons about three or four minutes later, Ragusa arrested and questioned him (R: 10-11, 13-14, 31). Ragusa next proceeded into Room No. 1 himself; he did not see any other rooms in the vicinity (R: 14, 100). Ragusa then recounted the same observations set forth in his affidavit concerning the presence of Zephier's stolen carton and petitioner in Room No. 1, the unexplained presence of a large amount of merchandise, petitioner's evasive responses to questions and the arrival, flight and apprehension of Purcell Hopkins with his "found" package.

On March 12, 1979, during the presentation of the People's case at trial, petitioner pleaded guilty to Criminal Possession of Stolen Property in the Second Degree in satisfaction of the entire indictment (R: 122). In the course of a full plea colloquy petitioner admitted that on December 7, 1977, he knowingly possessed stolen property valued in excess of \$250.00 (R: 124). On May 4, 1979 petitioner was sentenced as noted above.

D. The Remand and Hearing on the Motion to Controvert the Search Warrant

Petitioner appealed his conviction, alleging (1) that there was no probable cause to support the issuance of the search warrant; (2) that the warrant was overbroad and therefore void; and (3) that the court below should have granted a hearing on his motion to controvert the warrant. On March 6, 1980 the Appellate Division, First Department, of the New York Supreme Court unanimously affirmed the judgment against petitioner without opinion. 74 A.D.2d 753 (1st Dept. 1980). The New York Court of Appeals granted leave to appeal (R: 136). The Court of Appeals modified the order of the Appellate Division, holding that it was error for the trial court to have denied a hearing on petitioner's motion to controvert the search warrant, and remitted the case for such a hearing. 52 N.Y.2d 1063 (1981).

On December 21, 1981, a hearing on defendant's motion to controvert the search warrant was conducted pursuant to the order of the Court of Appeals. Justice Hortense Gabel presided. Police Officer Ragusa again testified to the events of December 7, 1977. His testimony was essentially the same as his testimony at trial (M: 32-97). At the conclusion of the hearing Justice Gabel upheld the search warrant. Justice Gabel held that although there were some differences between the information in the officer's affidavit and his testimony at the hearing, the differences were not essential and did not invalidate the warrant (M: 97-8).

Petitioner again appealed. By an order dated October 18, 1983 the Appellate Division, First Department, unanimously affirmed the judgment of conviction without opinion.

97 A.D.2d 379 (1st Dept. 1983). On December 13, 1983 leave to appeal the order of the Appellate Division to the New York Court of Appeals was denied by Associate Judge Matthew J. Jasen (AP: 7A).

E. The Instant Petition

Petitioner now contends that Officer Ragusa's affidavit contained "palpably false information" and "misrepresentations" (Petition, pp. 5 and 8) without which the affidavit would have been: (1) insufficient to support a finding of probable cause; and (2) insufficiently specific as to the premises to be searched and items seized to satisfy the requirements of the Fourth Amendment.

Reasons for Denying the Writ

Generally this Court will grant a petition for certiorari only where novel issues of national import or constitutional dimension are raised, or where there exists a split among the Federal appellate courts as to a particular issue. *See e.g. Davis v. Alaska*, 414 U.S. 308, 315 (1974); *Katzinger v. Chicago Metallic Mfg. Co.*, 329 U.S. 394 (1947). *See generally* Stern and Gressman, *Supreme Court Practice*, §4.27, pp. 315-17 (5th ed. 1978).

The claims raised by petitioner do not merit a grant of certiorari. Petitioner has attempted to formulate the question here in a fashion which implicates the rule of *Franks v. Delaware*, 438 U.S. 154 (1978) which holds that material misrepresentations in an affidavit for a search warrant will invalidate the warrant. Petitioner alleges that Officer Ragusa's affidavit contained deliberate falsehoods and that

consequently the hearing court should not have sustained the search warrant. Petitioner's claims do not raise novel or disputed questions of law; instead they call for the application of well settled law to an individual fact pattern with no ramifications beyond this case. Furthermore, petitioner's claims are simply untrue and involve a distortion of both the findings of the court below and the record upon which those findings were based.

Petitioner draws attention to an apparent discrepancy between Officer Ragusa's affidavit, on the one hand, and his testimony both at trial and at the hearing on the warrant, on the other. In his affidavit Officer Ragusa stated:

- a). that on December 7, 1977 at approximately 4:30 p.m., I personally observed Antony Zephier remove one carton containing merchandise from a hand truck being pushed on the street by a delivery person, and run away with said carton.
- b). that I followed said individual to 270 W. 39th St. 5th floor, Room No. 1 and saw said individual enter said premises with said merchandise.
- c). that I waited near the elevator door on the 5th Floor and saw said individual leave Room No. 1 without the carton.

(AP: 8A-9A). At trial and again at the hearing on the warrant Ragusa frankly testified that although he followed Zephier up the elevator to the fifth floor at 270 West 39th Street (R: 8-9, 26-7), when Zephier went around a corner down the corridor Ragusa briefly lost sight of him (R: 29, 93). Ragusa did not see Zephier enter or exit the door of Room No. 1; instead he next saw Zephier about three or four minutes later when Zephier returned to the elevator without the package (R: 10-11, 28, 31).

On this basis petitioner now urges that under the rule of *Franks v. Delaware* suppression of the evidence seized pursuant to the warrant was "mandated" (Petition, p. 8). *Franks* makes it clear that where a warrant affidavit contains a false statement, made either intentionally or with reckless disregard for the truth, and where the material that is the subject of the falsehood is necessary to a finding of probable cause, a defendant is entitled to suppression of evidence seized pursuant to the warrant.

Petitioner does not appear to take issue with this well settled principle or to challenge any statement of law made by the courts below. Instead petitioner appears to contend only that the hearing court found that Ragusa's affidavit contained "misrepresentations" (Petition p. 8). Petitioner does not appear to contend that the hearing court found that these misrepresentations were necessary to a finding of probable cause. Therefore petitioner's own argument seems to concede that the court did not misapply the rule of *Franks* which requires a showing of both falsehood and materiality.

If petitioner intends to imply that the court below erred in finding that the alleged falsehoods were not material, that contention is not a proper issue for this Court's review. It involves a simple finding of fact which is not a proper subject for review by this Court, and one peculiar to this case alone; it does not involve any broader issue of law.

Indeed, even if the court below had found that Ragusa's affidavit contained representations which were both deliberately false and material, the court's decision not to suppress the evidence seized would have constituted an isolated, simple error of law without broader import justifying certiorari.

In any event, the factual premises underlying defendant's argument are inaccurate, because petitioner has mischaracterized the findings of the court below. Petitioner asserts that the hearing justice "concluded" that the challenged statements "were in fact false and constituted misrepresentations" (Petition, p. 8). Petitioner is wrong. The hearing court instead concluded:

I think there are some differences in the warrant and none of them are essential elements that would contravene any basic statement the officer made in applying for the warrant and the warrant itself.

I believe that these are errors that could have been made in the press of an application for this. The error in no way prejudiced the defendant and I therefore sustain the warrant (M: 97-8).

Thus the court in substance concluded that there had been no violation of the *Franks* standard, since Ragusa's statements were neither intentionally or recklessly false and that in any event the challenged statements were not necessary to a finding of probable cause.

The hearing court's conclusion was correct. Officer Ragusa's affidavit at worst contained an ambiguity on a point not essential to a finding of probable cause. The affidavit states that Ragusa followed the thief to 270 West 39th Street, fifth floor, Room No. 1, and saw him enter the "premises" with the stolen carton. The term "premises" is imprecise; it may refer to the whole building, only to the fifth floor or only to Room No. 1 itself. The courts have recognized that semantic imperfections in warrant affidavits may arise because of the exigencies of hurried drafting by a

non-lawyer police officer while other officers wait to conduct a search. *See United States v. Ventresca*, 380 U.S. 102, 108 (1965).

Furthermore, this imprecision of language is without significance in the factual context of this case. Ragusa proceeded down the same hall through which Zephier had scurried minutes before with the stolen carton. Room No. 1 was the only room in the vicinity. Ragusa entered Room No. 1 and in short order observed both the stolen carton which Zephier had by his own admission just "fenced" with "Benny" and "Benny" himself—the petitioner Ben Schwartz. Although Ragusa did not see Zephier take the last few steps before entering Room No. 1 it was obvious from the unchallenged facts in Ragusa's affidavit that Zephier had just sold his stolen carton in Room No. 1 and that a fencing operation was being conducted within. The presence of Zephier's stolen box, the unexplained vast quantities of merchandise, Schwartz's evasive conduct, the arrival and flight of Hopkins with his carton, and the arrival of the known rack and package thief, all amply and independently supported Ragusa's assertion of probable cause.

Petitioner's contentions here involve a rather minor question of fact that was fairly resolved against him by the hearing court below which was affirmed without dissent. Indeed petitioner is only able to challenge these prior determinations by distorting the record below. His argument is without merit and its further consideration would not serve the purposes of certiorari.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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